JD–88–01
Kalamazoo, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ZIMMERMAN PLUMBING
AND HEATING CO., INC.

and

LOCAL 7, SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION, AFL-CIO

Cases 7–CA–37323
7–CA–37513
7–CA–37599(2)(3)(4)
7–CA–37755
7–CA–37868

Richard F. Czubaj, Esq., for the General Counsel.
Bruce L. Link, Corporate Secretary/Treasurer,
of Kalamazoo, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

ARTHUR J. AMCHAN, Administrative Law Judge. In November 1997, the Board issued a decision finding that Respondent had discriminatorily discharged Andy Lytle, Steve Stone and Todd O'Brien and ordered Respondent to offer these employees reinstatement and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 325 NLRB 106 (1997). The Board's order in all respects relevant to these discriminatees was enforced by the United States Court of Appeals for the Sixth Circuit.[1] On February 26, 2001, the Regional Director issued a compliance specification and notice of hearing which concluded that Lytle would be made whole by $9,203.90 in backpay, Stone by $5,336.57 and that O'Brien was not due any backpay. Respondent in its answer took issue with the amounts specified for Lytle and Stone. A hearing with regard to the compliance specification was held in Kalamazoo, Michigan on May 2, 2001. At the end of the hearing the General Counsel recalculated the backpay due Andy Lytle as $9,257.90. Both the General Counsel and Respondent filed post-hearing briefs.

Summary of Facts found in the underlying Board decision

In April 1995, Plumbers Local 337 and Sheet Metal Workers Local 7 embarked upon a joint effort to organize Respondent. On May 5, Local 337 faxed a letter advising Respondent that Andy Lytle, Todd O'Brien and one other employee were members of a joint organizing committee. On May 15, 1995, Local 7 faxed Respondent a similar letter identifying Stone and 3 other employees as organizing committee members. All seven employees began wearing union insignias on their hardhats and picketing Respondent's jobsites during breaks and at lunch.

In June 1995, Respondent began enforcing a "no-fault" attendance system that it rarely, if ever, enforced previously. On June 7, Lytle, Stone and other union supporters were issued disciplinary warnings for violation of this policy. The Board found that Respondent violated

[1] The Sixth Circuit decision is unpublished, see Table at 188 F. 3d 508 (6th Cir. 1999). The text of the decision can be found at 1999 Westlaw 701900.

Section 8(a)(3) and (1) in issuing these warnings. The Board also found that Respondent violated the Act by maintaining and enforcing a rule prohibiting employees from placing any union stickers on company hardhats or from wearing their own hardhats.

All seven of the employees on the organizing committee engaged in an unfair labor practice strike from June 28, to July 28, 1995. Both Stone and Lytle worked for union contractors during this period. On August 22 and 23, 1995, respectively, Respondent discharged Lytle and Stone, each of whom had worked for it for 4–5 years. O'Brien was also discharged on August 23.

The Board found that Respondent violated the Act in disciplining and then discharging Lytle for violating its rule prohibiting the wearing of union insignias on company hardhats or the wearing of personal hardhats. Respondent claimed that Stone was discharged because he kicked another employee's soda bottle. However, the Board concluded that the General Counsel established that Zimmerman discharged Stone in retaliation for his union activities and that Respondent had not established that it would have summarily terminated Stone for the soda bottle incident in the absence of these activities.

Analysis

The general principles in determining backpay are well-established and are summarized in many Board decisions, including *Cliffstar Transportation Co.,* 311 NLRB 152, 153 (1993). These principles are as follows: The General Counsel's burden in a back pay proceeding is to show the gross backpay due each claimant, i. e., the amount the employees would have received but for the employer's illegal conduct. The General Counsel may use any formula to compute gross backpay, which approximates what the discriminatees would have earned had they not been discriminated against, if it is not unreasonable or arbitrary in the circumstances.

When presented with backpay and alternate backpay formulas, the judge must determine which is the most accurate method to determine backpay. Where there are uncertainties, or ambiguities, they are to be resolved in favor of the discriminatee. The burden is on a respondent to establish any affirmative defenses that would mitigate its liability, including the amount of interim earnings that are to deducted from the backpay amount due, and any claim of willful loss of earnings. For the reasons stated below, I conclude that the General Counsel has met his burden of proving gross backpay and that Respondent has not met its burden of proving any affirmative defenses other than those already taken into account by the General Counsel in the compliance specification (e.g. the interim earnings of the discriminatees).

Respondent's contentions with regard to the compliance specification

Respondent in its answer to the compliance specification and its post-trial brief makes numerous objections with regard to the General Counsel's calculation of backpay. In the answer it proffers a backpay award of $2,564.76 to Stone and $3,980.74 to Lytle, plus interest calculated by excluding that portion of the backpay that would have been withheld for payment of Federal and state taxes.[2]

[2] In its answer, but not in its brief, Respondent appears to object to the General Counsel's computation of back pay by quarters, contending that Lytle and Stone had more interim earnings during the backpay period than the gross quarterly earnings they would have earned had they been employed by Zimmerman. In *F. W. Woolworth Co.,* 90 NLRB 289 (1950), the

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Respondent's challenge to the formula used by the General Counsel in determining average weekly hours

The parties agree on the length of the backpay period, August 22, 1995 to October 18, 1999 for Lytle, and August 23, 1995 to October 18, 1999 for Stone. However, Respondent challenges the General Counsel's use of a backpay formula using the average hours worked during the backpay period by four comparable plumbing employees for Lytle and two comparable sheet metal employees for Stone. Respondent argues that the average weekly hours that Stone and Lytle worked in the year prior to their discharges should have been used in the calculation. According to Respondent, backpay should have been determined on the basis of average weekly hours of 38.86 hours for Stone, rather than 40.23; and 37.02 weekly hours for Lytle, instead of 40.79.

I conclude that the General Counsel's computation of hours is more accurate than that of the Respondent for the following reasons: first, Respondent calculated only hours worked for its employees in 1994, rather than hours for which each employee was paid. Since both Stone and Lytle had worked for Zimmerman for 4–5 years, they may or may not have been entitled more vacation time than the employees to whom they were compared by Respondent. Some employees are entitled to one week's vacation and others two weeks. Some or all employees may have received paid holidays as well.[3] The General Counsel's computation during the backpay period is based on the total hours for which employees were paid, and is thus more accurate.

Secondly, the General Counsel's computation is consistent with the application of the General Counsel's objective administrative guidelines for computing backpay. NLRB Compliance Officers compute backpay in accordance with a Compliance Manual, which although not legally binding on the General Counsel or the Board, provides some degree of consistency and objectivity in calculating backpay. This manual directs NLRB compliance officers to apply one of three basic formulas: 1) the average hours and/or earnings of the discriminatees prior to discharge (the use of which is advocated by Respondent herein); or 2) the hours and/or earnings of comparable employees during the backpay period (the method

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Board adopted the computation of backpay by quarters. It did so on the grounds that discriminatees who are unemployed for a lengthy period at the start of the backpay period often find employment at a higher wage than they were paid by a respondent. As a result, the Board found that its prior practice encouraged respondents to delay offering backpay on the chance that the passage of time would reduce or extinguish their backpay liability. Conversely, the Board opined that its prior practice pressured discriminatees to waive reinstatement in order to preserve the amount of backpay that had accumulated during the early part of the backpay period.

[3] Exhibit R-9, Respondent's calculations of hours worked in 1994, is a summary which is admissible under Rule 1006 of the Federal Rules of Evidence, provided that the underlying documents are made available for examination or copying, at a reasonable time and place. Respondent did not have the underlying documents in the courtroom at the hearing. The General Counsel objected to the receipt of the exhibit on that basis. However, Respondent represented that they were available for inspection at its office in Kalamazoo. I believe this satisfies the requirements of Rule 1006 in that the General Counsel could have asked for the opportunity to examine these records after the hearing with leave for the opportunity to strike Exhibit R-9 from the record if it did not accurately summarize the records from which it was derived.

used by the General Counsel); or 3) the hours and/or earnings of replacement employees (a method not relevant to the instant case).

The Compliance Manual at section 10532.2 recommends using the average weekly hours of the discriminatees prior to discharge (formula 1), when conditions that existed prior to the unlawful action would have continued unchanged during the backpay period. The manual also provides:

> In general, this method is most applicable to a short backpay period. As the back pay period becomes longer, it becomes more likely that significant changes in conditions will occur.

The manual provides that use of formula two, based on the average weekly hours of comparable employees during the backpay period, is particularly appropriate when there have been significant changes in conditions during the backpay period. Since the hours worked for the comparable employees used by the General Counsel during the backpay period appear to be very similar to the average weekly hours worked in 1994, I conclude that the General Counsel could appropriately have used either formula one or formula two. However, Respondent has not shown that it was inappropriate to use formula two nor that a calculation based on its summary of 1994 earnings is a more accurate calculation of the backpay due Stone and Lytle. Not only are Respondent's figures less accurate in that they do not compare hours for which employees were paid, they represent hours worked over a much shorter time span than do the General Counsel's (a maximum of 12 months, as opposed to over 48 months for 5 of the 6 comparable employees).

In conclusion, I find that it is more accurate in determining the number of average weekly hours that Stone and Lytle would have worked during the backpay period to use the average weekly hours for which 6 comparable employees were paid for a 213 week period (113 weeks for comparable employee Harris) than to use the average hours that Stone and Lytle worked in 1994, excluding the non-work hours for which they were paid.

Respondent's objections to the General Counsel's assumption that Stone and Lytle would have received the same wage increases that were received by the comparable employees.

Respondent argues that the General Counsel incorrectly assumed that Stone and Lytle would have received wage increases that were received by the comparable employees. Respondent cites the fact that both were dropped from Respondent's apprenticeship program and were inferior employees, according to the testimony of Rick Mahoney, its vice-president in charge of field operations. Respondent did not rebut the testimony of Stone and Lytle that they received wage increases in each year they worked for Respondent. Moreover, Mahoney's contentions regarding Stone are belied by the findings of the Board in the underlying case.

On May 11, 1995, Bart Bartholomew, one of Respondent's foremen, approached Stone and said that:

> There was union talk in the wind and that Stone was a good worker, and that he wanted to recommend Stone for a prevailing wage supplement...Bartholomew added that he would not be able to recommend Stone to the owners for this journeyman's position unless he knew how Stone felt about the Union and he also added that he was speaking for Mahoney. Stone, who had not as of that point made his prounion sympathies known, said that he felt uncomfortable

> talking about the issue and that he chose not to make his views known one way or the other...

325 NLRB at 111.

On the basis on the above findings, the Board found that Respondent violated Section 8(a)(1) in interrogating Stone with respect to his union sympathies. Based on these findings, I decline to credit Mahoney's testimony that either Stone or Lytle was doing unsatisfactory work during their employment with Zimmerman, or that Respondent was unhappy with them in any respect until it found out they were part of an effort to organize the company.

I also conclude that the fact that Respondent removed Stone and Lytle from its apprenticeship program does not establish that it would not have given them the same raises as the comparable employees, if it granted such raises on a nondiscriminatory basis. On July 13, 1995, after the organizing campaign began, Bruce Link advised all Zimmerman's apprentices that starting on July 24, they would be required to attend school at least 4 hours a week. Stone, who was on strike, did not attend any such classes after July 13, and was removed from the apprenticeship program with two apprentices who were not involved in the organizing campaign. A charge was filed regarding Stone's removal, but was dismissed after investigation by the General Counsel, 325 NLRB at 119.

The Board, however, found that Respondent disparately applied the attendance requirements to union and nonunion apprentices in concluding that Zimmerman violated Section 8(a)(3) and (1) in terminating union supporter Tim O'Brien from its apprenticeship program, 325 NLRB 119-120. Given the discriminatory application of the apprenticeship program to O'Brien, as well as to the lack of any indication that Respondent was in any way unhappy with Stone and Lytle prior to the organizing drive, I conclude that the termination of Stone and Lytle from the Zimmerman apprenticeship program is irrelevant to the calculation of their backpay. It provides no basis for concluding that had they been treated in a nondiscriminatory fashion that they would not have received the wage increases that the comparable employees received.

Respondent's objection to the General Counsel's exclusion of fringe benefits from interim earnings.

When working for union contractors during the backpay period, Stone and Lytle received substantial fringe benefits. The General Counsel did not include these fringe benefits in computing the discriminatees' interim earnings, which were deducted from gross backpay. The General Counsel did, however, deduct union dues from Stone and Lytle's interim earnings.[4]

When an employer pays wages only and does not pay fringe benefits, such as contributions to a health insurance plan, it is Board policy to make no offset against gross backpay for whatever is paid on behalf of discriminatees as fringe benefits by interim employers. The Board does assign a monetary value to fringe benefit payments received during interim employment and offsets such payments against fringe benefits paid by the Respondent as a separate category. Since the General Counsel did not include any fringe benefits in computing the backpay due Stone and Lytle, it correctly made no offset to account for the fringe benefits

[4] Respondent incorrectly states at page 4 of its brief that "fringe benefits were used when calculating the presumed Zimmerman wage." Although Respondent paid fringe benefits to employees working on prevailing wage rate projects, the General Counsel only used the base wage rage for nonprevailing wage rate jobs in computing gross backpay.

paid Stone and Lytle by interim union employers, *Tualatin Electric,* 331 NLRB No. 6 (May 12, 2000), enfd. _*F.3d*_, 2001 WL 667893 (D.C. Cir. March 8, 2001).[5]

Respondent's objection to the inclusion of the union dues paid by Lytle and Stone during the backpay period in the award.

In part, Respondent's objection to the deduction of union dues from the interim earnings of the discriminatees is based on the fact that the General Counsel did not offset the fringe benefits paid by interim employers against wages for the backpay period. That contention is addressed above. However, Respondent also argues that union dues should not be deducted because Stone and Lytle were paying union dues prior to their discharge in order to work for union contractors. Therefore, it suggests that union dues were not a expense they incurred to obtain and maintain interim employment.

The discriminatees were required to pay union dues when they were working for union contractors during the backpay period. Thus, it is appropriate to deduct this expense from their interim earnings. With regard to Stone, Respondent's argument clearly has no merit since Stone's pre-discharge union employment appears to have been largely or exclusively the result of his participation in an unfair labor practice strike between June 28 and July 28, 1995. Lytle, however, appears to have been working a substantial number of hours for union contractors even before the strike (224 hours in May 1995; 158 hours in June). Thus, assuming Lytle had not been discharged and had continued to moonlight for union contractors he would still have been paying union dues.

I conclude that the exclusion of union dues, which ranged from $117 per month to $162 per month during the backpay period, is proper in Lytle's case. It is too speculative to determine whether Lytle would have continued to moonlight on union jobs had he not been discharged in August 1995. The uncertainty with regard to this question must be resolved against Respondent.

Respondent's objection to computing interest on that portion of back wages that would have been withheld for taxes.

Respondent argues that interest should not be applied to back wages that would have been withheld from the discriminatees for tax purposes, which it estimates to be about 24.5% of back wages. The Board has never deducted amounts that would have been withheld from the wages on which interest has been computed. In *Inta-Roto, Inc.,* 267 NLRB 1026 at 1029 (1983), the Board adopted the rationale of Judge Thomas Ricci:

> This principle that uncertainty in backpay calculations must be resolved in favor of the man who suffered the wrong, applies precisely to the final issue raised by the Respondent. Why should Maxey and Reszies receive interest on that part of the money they would have earned which would never have come into their hands anyway, because the Company had to withhold some of it for direct

[5] Respondent appears be arguing at page 9 of its brief that since the General Counsel included some fringe benefits, e.g., paid holidays and vacations, in calculating the average weekly hours of the comparable employees during the backpay period, justice requires the offset of fringes paid by interim employers during the backpay period against wages, or not deducting union dues from interim earnings. Board precedent provides neither for such for an offset, *Tualatin, supra,* nor for ignoring union dues paid to maintain interim employment.

> payment to the State of Federal government for income taxes then due? A sufficient answer is, because there is no way of knowing how much the backpay now to be given the men will be subject to taxes, or at least at what rate it will be taxable. They will receive the cash in 1982 instead of 1980. But now they are working full time at regular salaries. Since they probably file their tax returns on a cash basis, as do most ordinary workmen, this means all of the belated payments will be subject to a much higher rate of taxation than would have been the case had their gross earnings each year remained regular. Should the Respondent now be ordered to pay each man for the additional monies they will have to pay in taxes as a direct result of the wrong done them? I think it best to leave this matter alone and stick to the Board's established practice.

For the reasons set forth by Judge Ricci, I also see no reason to depart from established practice. Additionally, it is possible that Stone and/or Lytle received tax refunds during the backpay period and that they would have had the use of some of the backpay.

Respondent's backpay liability to Steve Stone should not be reduced on account of the fact that Stone had lost his driver's license for driving with excessive bodily alcohol content in 1997.

Steve Stone's driver's license was revoked in January 1997 for driving with unlawful bodily alcohol content. The period of the revocation was extended later when Stone was cited for driving without a valid license. Respondent argues that Stone was less employable without a driver's license. Further, it contends that since he lost his license due to misconduct, backpay should stop in January 1997. This contention is without merit because Stone not only diligently sought work throughout the backpay period, he was employed during virtually all of it. Therefore, Respondent can make no legitimate argument that its backpay liability should be reduced due to a willful loss of earnings on Stone's part.

Because of Stone's success in securing interim employment, the $5,336.57 in backpay calculated for him emanates from only two quarters of the backpay period; the third quarter of 1995 ($2,655.18), and the first quarter of 1999 ($2,681.39). For all other quarters, Stone's net interim earnings exceeded his gross quarterly earnings. Stone apparently had a period of unemployment in March 1999, which accounts for the net backpay for that quarter. There is no reliable evidence regarding the reasons for Stone's unemployment in March 1999. Supervisory compliance officer Harris Berman testified that Stone told him he had been laid off, which is, of course, hearsay. Stone testified at the backpay hearing, but neither party asked him why he was unemployed that month or what efforts he made to find work after being laid off. Stone testified he was never unemployed due to his lack of a drivers' license. GC Exhibit 4 establishes that Stone worked for Kalamazoo Custom Metal, a union contractor, in February 1999 and then with W. Soule & Company, another union contractor, from April through September 1999.

In order to reduce its backpay liability, it is Respondent's burden to show that Stone willfully lost earnings during the backpay period:

> ...[a]n employer may mitigate its backpay liability by showing that a discriminatee neglected to make reasonable efforts to find interim work... This is an affirmative defense, however, and the burden is on the employer to show the necessary facts. The employer does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings...Further, the standard to which an employee's efforts are held is one of reasonable diligence, and he or she need not exhaust all possible job leads...Finally, in determining whether an

> individual claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period... Any uncertainty in the evidence is resolved against the Respondents as the wrongdoers...(citations omitted).

Black Magic Resources, 317 NLRB 721 (1995).

Respondent has failed to meet its burden of proving that Steve Stone neglected to make reasonable efforts to find interim work. First of all, it failed to introduce any evidence on this point, other than speculation by its vice president, Rick Mahoney, that anybody could find work during this period. Moreover, Stone's employment record establishes that, in looking at the backpay period as a whole, Stone diligently sought interim employment. Therefore, I reject Respondent's contention that he is not entitled to backpay for the first quarter of 1999, *Saginaw Aggregates,* 198 NLRB 598 (1972).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

Respondent, Zimmerman Plumbing and Heating Co., Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall pay to Andy Lytle the sum of $9,257.90, and shall pay to Steve Stone the sum of $5,336.57, with interest to be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.

Dated, Washington, D.C. June 29, 2001.

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Arthur J. Amchan
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.